



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: [REDACTED] Office: TEXAS SERVICE CENTER

Date: AUG 10 2000

IN RE: Petitioner:
Beneficiary:

[REDACTED]

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[REDACTED]

Public Copy
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a mutual insurance company. It seeks to employ the beneficiary as a "Programmer/Analyst II" in the company's information systems department, at a salary of \$32,293 a year. Accordingly, the petitioner endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C). The director determined that the petitioner had not established that the beneficiary had been and will be employed in a managerial or executive capacity.

On appeal, counsel submits a brief, asserting that the director misconstrued the facts of the case and failed to give proper weight to the evidence. No additional evidence was submitted for the record.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United

States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from

higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner submitted a cover letter, a copy of the beneficiary's nonimmigrant petition approval and passport, a copy of the petitioner's 1996 corporate income tax return, and a copy of the petitioner's annual report for 1997. The petitioner did not submit copies of the petitioner's organizational chart or otherwise explain the beneficiary's position within the petitioning organization.

In the letter accompanying the original filing, the petitioner described the beneficiary's duties as follows:

[The beneficiary] is currently working in [redacted] on the basis of his L1-A [sic] visa, in the position of Programmer/Analyst II in the Information Systems Department, on the applications team supporting International Operations. In this capacity, [the beneficiary] has managerial responsibility for virtually all aspects of the development process for several Group Insurance applications serving our International [sic] field offices. [The beneficiary] is responsible for several mission critical production applications, such as our Group Refund Formula, Group Renewal Formula, and the Claims Experience System just to name a few. Among the development processes which [the beneficiary] directs in relation to these systems are: analysis, design, programming, testing, implementation, training, and support of the computer systems and applications serving our International users both in the Home Office and in each of our eight Latin American markets. The effective execution of these functions is essential toward addressing the company's current and future goals that have been set for our International Operations.

Regarding the duties of the programmer analyst position, the beneficiary's supervisor stated:

I am the Manager of the International Systems team of Information Systems Department where [the beneficiary] currently works, with a total of ten staff positions that report directly to me. Of the ten positions, nine are programmer/analyst positions that are staffed by computer science personnel with varying levels of technical training, expertise, and familiarity with our specific applications and development procedures. Each of the programmer/analysts is given management responsibility for specific aspects of the development process for an applications system or set of application systems, depending on the size of the applications and the workload which exists for each system. Within the scope of their assigned applications, they are solely responsible for all aspects of the development process, and

work with little direct supervision.

Based on the description of the beneficiary's duties, it is apparent that the beneficiary is performing the actual duties of a programmer analyst on a team of ten programmer analysts, and not managing the company's overall function of programming and system support.

After reviewing the petition, the director instructed the petitioner to submit further evidence to establish that the beneficiary had acted, and would continue to act, in an executive or managerial capacity. The director specifically inquired whether the beneficiary was performing the actual programming and system troubleshooting that is implied by the petitioner's statement that he is "solely responsible for all aspects of the development process."

In response, the petitioner stated:

[The beneficiary's] duties consist of analysis where he uses his professional discretion to manage development solutions for the applications serving our International Group Life & Health operations in seven countries . . . where the Petitioner operates through branch offices and wholly owned [sic] subsidiaries. His management functions include, but are not limited to, managing problem resolutions and enhancing the following systems: Client Database Administration, Group Billing - Premiums, Accounting and Financial Reporting, Agent payment of commission's [sic], Health claims processing, and User/Management level report (about seventy percent of his time).

In this capacity, the beneficiary does not supervise any employees, but instead he is responsible for managing support, training, and problem solving activities (about fifteen percent of his time) in the seven branch offices and wholly owned [sic] offices mentioned. He provides management and support for designing manuals and documentation utilized by users, as well as program enhancements for systems in his area of responsibility (about fifteen percent of his time).

In its response, the petitioner did not answer whether the beneficiary is performing the day-to-day tasks of programming and system troubleshooting.

In his decision, the director noted that the beneficiary appeared to be doing the actual day-to-day work of the company. The director concluded that the beneficiary is a programmer analyst on a team of programmer analysts, and is primarily performing the daily duties of the petitioning enterprise.

On appeal, counsel asserts that the director misconstrued the facts established by the petitioner regarding the beneficiary's duties and asserts that the majority of the beneficiary's duties are managerial.

Counsel's claims are not persuasive. The petitioner does not claim that the beneficiary is an executive but instead claims that the beneficiary is performing managerial duties. To qualify under this preference visa classification, a managerial employee must either supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function within the organization, or a department or subdivision of the organization. Furthermore, if the beneficiary does not supervise other employees, the beneficiary must function at a senior level within the organizational hierarchy or with respect to the function managed. 8 CFR 204.5(j)(2).

In the present petition, the petitioner has not established that the beneficiary is performing the duties of a manager. The Service will not be persuaded that a position is managerial when a petitioner merely phrases a description of the job duties in a way that emphasizes independent or administrative tasks. First, the Service will look at the actual day-to-day activities and job duties of the position to determine whether the position is managerial. § 101(a)(44)(A)(i) of the Act. Second, the Service will examine the beneficiary's sphere of responsibility to determine whether the beneficiary manages an essential function of the petitioning organization. § 101(a)(44)(A)(ii) of the Act. Third, the Service will look at the beneficiary's position within the organizational structure and determine whether the beneficiary functions at a senior level within the management hierarchy of the organization. § 101(a)(44)(A)(iii) of the Act. And finally, the Service will examine whether the beneficiary has autonomy and discretion in deciding organizational goals and activities with respect to the essential function. § 101(a)(44)(A)(iv) of the Act. The Service will also look to other obvious factors, such as the beneficiary's job title and the level of remuneration, as indicators of a managerial position.

First, the petitioner has not submitted a sufficiently detailed description of the beneficiary's job duties and day-to-day activities to establish whether the position is managerial. Instead, the petitioner has submitted broad statements which vaguely refer to "managerial responsibility" and "professional discretion." When specifically asked by the director if the beneficiary performs the actual programming and system troubleshooting, the petitioner avoided the question by vaguely responding that "[h]is duties consist of analysis where he uses his professional discretion to manage development solutions." The petitioner also vaguely asserted that the beneficiary is responsible for "managing support, training, and problem solving

activities" in the petitioner's foreign offices, as well as "provid[ing] management and support for designing manuals and documentation." The Service is unable to determine from these statements whether the beneficiary is performing managerial duties with respect to these activities or whether the beneficiary is actually performing the programming activities for the foreign offices and writing instruction manuals for his local office. The petitioner did not submit any evidence in support of these assertions. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Second, the petitioner has not established that the beneficiary manages an essential function of the petitioning company. It is apparent that the beneficiary performs tasks which are essential to the operations of the petitioning enterprise. However, it may be presumed that each employee is performing a job which is essential to the enterprise, otherwise there would be no need for the position. The question here is whether the beneficiary is managing an essential function, as required by the statutory definition of manager, or whether he is primarily performing the day-to-day operations of the essential function. As noted by the beneficiary's supervisor, "[e]ach of the programmer/analysts is given management responsibility." As the beneficiary is working on a team of staff members, where each member claims to have some managerial responsibilities, the beneficiary will not be deemed to be managing an essential function when the sole managerial element of his job is that he is largely autonomous in the performance of his duties. The director properly noted in the denial that "while [the beneficiary] may require little supervision and manage his workload with little direction from others, he is primarily performing the daily duties necessary for the company to function."

Third, the petitioner has not established that the beneficiary is functioning at a senior level within the organizational hierarchy. While the petitioner indicated that it employs a total of 870 employees, it did not submit a copy of an organizational chart or otherwise explain the beneficiary's position within the corporation. Instead, the petitioner indicated that the beneficiary worked on a team of ten programmer analysts within the information systems department. The petitioner did not clarify whether there are other teams of programmer analysts within the information systems department. The petitioner further disclosed that the beneficiary's group is supervised by the "Manager of the International Systems team." Due to the lack of evidence, it is not clear whether the beneficiary's manager reports to the manager of the information systems department or whether the manager reports to an executive in the upper level of the organization. As the petitioner serves on a team of ten programmer analysts, each with similar responsibilities, the petitioner has not established

that the beneficiary functions at a senior level within the organization or with respect to any essential function. Based on the evidence submitted, the beneficiary appears to be a programmer analyst staff member, without managerial duties, who in turn is supervised by a first-line manager. As such, the beneficiary's capacity does not rise to the level of a managerial position.

Fourth, the petitioner has not established that the beneficiary exercises discretion over the day-to-day operations of the claimed essential function. Although the petitioner indicated that the beneficiary is "solely responsible for all aspects of the development process, and work[s] with little direct supervision," the petitioner clearly stated that this autonomy existed only within the scope of his specific assignments. As noted previously, the beneficiary's daily assignments and tasks would not rise to the level of an essential function of the company as he is performing those functions himself and working on a team with other programmer analysts performing similar duties. Furthermore, the petitioner did not establish that the beneficiary exercises discretion over his day-to-day assignments, regardless of whether they qualify as the management of an essential duty. As noted by the director, the fact that the beneficiary may perform his duties in an autonomous manner does not indicate that he is employed in a managerial capacity.

Finally, it is noted that the beneficiary does not possess a managerial title or a commensurate salary, which is consistent with the fact that he is primarily performing non-managerial duties. See generally Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, 2000-01 Edition, at 113-15 (defining the typical duties and earnings of a programmer analyst).

The record contains insufficient evidence to demonstrate that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary in the proposed position does not persuasively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing nonqualifying duties. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Counsel suggests on appeal that this petition must be approved because the beneficiary was previously granted nonimmigrant classification as an L-1 manager. The director's decision does not indicate whether the beneficiary's nonimmigrant file was reviewed. Copies of the initial L-1A nonimmigrant visa petition and

supporting documentation are not contained in the record of proceeding. Therefore, it is not clear whether the beneficiary was eligible for L-1A classification at the time of the original approval, or if the approval of the L-1A nonimmigrant classification involved an error in adjudication. However, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in this immigrant petition, the approval would constitute clear and gross error on the part of the Service. As established in numerous decisions, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988); Matter of Church Scientology Int'l., 19 I&N Dec. 593, 597 (BIA 1988).

Finally, as briefly noted by the director, the record is not persuasive in demonstrating that the beneficiary has been employed overseas in a managerial or executive capacity for at least one year by the corporation or an affiliate or subsidiary. In the initial petition, the petitioner merely stated that the beneficiary was an "Operational Analyst" in the Dominican Republic, and "had a broad range of management authority and discretion in analyzing administrative procedures and designing and implementing new procedures within the Dominican Republic affiliate" Again, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, supra. As the appeal will be dismissed on the grounds previously discussed, this issue need not be examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.